PUBLIC PROSECUTOR

v.

MAK HING

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[FT CRIMINAL TRIAL NO. 29 OF 1984]
26 FEBRUARY 1988

CRIMINAL LAW: *Dangerous Drugs - Heroin and morphine in a plastic bag alleged found on accused - Accused alleged that he was not in possession of it and that it was found at the scene of arrest later - Station diary as to movement of police missing - Whether reasonable doubt created.*

The accused was charged under s. 39(B) of the Dangerous Drugs Act 1952. The police alleged that on the night of 18 April 1984, 3 police personnel spotted the accused riding on a motor cycle at Jalan Tun Razak behaving in a suspicious manner. The accused was stopped by the police and the police alleged that a plastic bag containing 31.87 grammes of heroin and 6.97 grammes of morphine was at the material time being held by the accused in his right hand. The accused's version of events was that he was waiting at the scene of the arrest when he was arrested by a single police officer and not as alleged by the police and that he did not have in his possession a plastic bag containing the drugs as alleged. He alleged further that the plastic bag containing the drugs were found by the police on a subsequent visit to the scene of the arrest.

The Court ordered the production of the station diary to ascertain the movements of the various police personnel but was informed by the officer in charge that the diary was missing.

Held:

[1] Taking all the facts and the discrepancies in the prosecution's case, a reasonable doubt had been created by the accused.

[2] The accused is acquitted and discharged.

For the public prosecutor - Ahmad Rosli, DPP
For the accused - Ngeow Yin Ngee; M/s. Ngeow & Maurice Gomes

JUDGMENT

KC Vohrah J:

The charge against the accused reads as follows:

> That you on 18 April 1984 at about 8.15 p.m. at Jalan Tun Razak near Langgak Golf, in the City of Kuala Lumpur, in the Federal Territory did traffic in Dangerous Drugs to wit 14 plastic packets of heroin weighing a total of 31.87 grammes and 10 plastic packets of morphine weighing a total of 6.97 grammes on your own behalf and that you have hereby contravened the provisions of para. (a) sub-section (1) of s. 39(B) of the Dangerous Drugs Act 1952 (Revised Act 234/80) and punishable under s. 39(B)(2) of the same Act as amended by Act A 553/83.

Detective Corporal Ishak (PW2) said in his examination-in-chief that he was on patrol duty with Detective Corporal Abdul Wahab (PW3) and 2 other police personnel going to Jalan

Tun Razak from Jalan Golf Club the night of 18 April 1984. PW2 was sitting in the passenger seat of the car belonging to and driven by Corporal Abdul Wahab (PW3).

While on the way to Jalan Tun Razak PW2 spotted a male Chinese, the accused, riding a motor cycle. He said he saw the Chinese behave "suspiciously" - "he looked to the left, to the right and to the back as if there was something." PW2 said that the motor cyclist was in front of his car and PW2 said he informed PW3 to tail it and "overtake him in order to force him to stop."

PW2 said PW3 agreed to do that and they tailed the motor cycle for 4 to 5 minutes; then PW3 overtook the motor cycle and the car cut across the path of the motor cycle and stopped in front of it. The place where this happened was a grass sidetable at Jalan Tun Razak.

PW2 said he got out and grabbed hold of the accused and he "appeared startled". He told the accused to put the motor cycle on its stand. He said that after the accused had done that he went to handcuff the accused assisted by other members. PW2 said the accused squatted down and he too squatted down facing him. This was after he had got hold of his right hand and had seen the accused hold a plastic bag in his right hand. He said the plastic bag held 24 small plastic packets, 14 of which contained a reddish substance, 9 contained a greyish substance and one held he thought, 8 plastic straw tubes.

The above was a description of what took place at the scene by PW2. This scene was re-visited the same night by PW2 and PW3 and the accused that night but before I deal with that I would like to examine what PW3 said of the arrest in his examination-in-chief.

PW3 said he drove his car that night with the team as PW2 had mentioned. While going back to Cheras Police Station they did patrolling duty. He said when he was on Jalan Langgak Golf, PW2 informed the team that a person riding a motor cycle was acting suspiciously. He then made his own observation and noticed that the motor cyclist was looking to his left and right.

He said they followed him and when "he (the accused) was about to turn left heading towards Jalan Cheras, Detective Ishak (PW2) asked me to overtake the motor cycle and stop him."

PW3 said he overtook the motor cyclist and crossed in front of him. And PW2 went straightaway to the male person. PW3 said that he also got out to give assistance to PW2 and when he got out he saw that PW2 had already hand-cuffed and arrested the accused; the accused was squatting, with PW2 squatting in front of the accused. He said he saw PW2 emptying the contents of a plastic bag.

He said that then they put the accused in the car and brought him back to Cheras Police Station. He instructed Detective Rahim to ride the accused's motor cycle back.

To continue with the evidence of PW2. He said that the team, with Rahim riding the accused's motor cycle, brought the accused to the Cheras Police Station arriving there at 8.25 p.m. At the station he questioned the accused and during the questioning Inspector Rajan (PW5) arrived at the Police Station and he informed the Inspector of the incident. He said Inspector Rajan asked him if he was satisfied (about the search) at the surrounding area at the place of arrest "because at the place of incident we were only helped by car light and torchlight." He said Inspector Rajan instructed him and the other team members to go to the place in a van. He said that during the questioning of the accused and when he received the instructions from Inspector Rajan the exhibits (the bundle of drugs) was in his hand.

He re-visited the scene leaving the station at 8.45 p.m. after locking the exhibit in his drawer. He went with the original team plus driver of the van, Corporal Jalil, and the accused. The police team except for Corporal Jalil searched the area but found nothing there and they went back at Cheras Station at about 9.30 p.m. And he lodged a police report (P14) of the arrest at 10.00 p.m.

Then he brought the accused to the Jalan Bandar Police Station and handed the accused, the bundle of drugs and the motor cycle to Inspector Raja Khalid (PW1), the investigation officer of the case.

I now come to the evidence of PW3 on what took place at the police station on their arrival at the police station and their re-visiting the scene. PW3 said the team took the accused to the Cheras Police Station and he instructed Detective Rahim to ride the accused's motor cycle back. At the police station they questioned the accused and they went back together with the accused to the scene in a van driven by Corporal Jalil in response to PW2's idea to search the area. They found nothing there.

PW5, Inspector Rajan, said that on the date in question he was attached to the Cheras Police Station as crime prevention officer. At about 8.30 p.m. that day PW2 informed him of an arrest of the accused and the seizure of 24 packets which were believed to contain drugs. He asked PW2 if he had done a search and if he had not done it to do a thorough search in the area of the seizure. He said PW2 came alone. He later went to PW2's room and saw the drugs there.

PW6, Mohd. Jalil, stated that he brought the team of 4 detectives and the accused to the scene for a search at a place at Jalan Tun Razak. He said he did not join in the search.

The I.O. confirmed that PW2 brought him the accused, the bundle of drugs and the accused's motor cycle. He stated that he received the 14 packets (P3A to N) containing a red substance, 9 plastic packets (P6A to I) containing a greyish substance and 1 plastic packet (P6J) containing 8 small plastic tubes also containing a greyish substance. He sent the 24 packets of substance to the chemist, Mr. Lau, for analysis and when he received the chemist report on the analysis he served a copy of the chemist report on the accused.

The chemist report showed that the 14 packets contained 31.87 grammes of heroin and the other 10 packets contained 6.97 grammes of morphine.

The cross-examination of the witnesses was directed to show that PW2 was on a motor cycle and not in a motor car when he apprehended the accused, that the accused was alone when he effected the arrest, that nothing was found on the accused, that a police team of 7 re-visited the scene in a van and found a package there. It was suggested that because nothing was discovered on the accused when he was arrested, no police report was made when PW2 brought back the accused after his arrest; and that was why the scene was re-visited and a package of drugs was discovered. The relevant station diary was asked for in relation to the movements of the police personnel in the crime prevention division in the Cheras Police Station on that day. The Court ordered its production. PW7, Sergeant Major Nathan who was officer in charge of the police station said that he instructed the man in charge of the store of the crime preventive division to find the diary and that he too personally went to look for it but it was missing. He stated that it was the only diary that was missing.

There were several discrepancies between the evidence of PW2 and PW3 as there were discrepancies in the prosecution case as regards the arrest and the subsequent search by a police party at the scene of arrest. But at the end of the prosecution case, however, I

suspended evaluating the evidence of the various witnesses being satisfied that the prosecution had not put up an inherently incredible story of the arrest of the accused and of his being found in possession of the drugs as specified in the charge. I invoked the relevant presumptions under the DDA as to the knowledge of the accused as the nature of the drugs and his trafficking in these drugs.

The accused elected to give sworn testimony.

The accused denied that he was having drugs on his person or that he was intercepted while riding his motor cycle there. He said that he was waiting there squatting beside his motor cycle after a futile search for some drugs which one Fei Loh had told him he hidden there. He wanted to take it as he was a drug addict. He could not find it and he waited for Fei Loh who promised to meet him there. Then he saw a person come alone in civilian clothes on a motor cycle, park it, then run towards him with a drawn gun (probably what he meant was a revolver as he saw him tuck it at his waist later). The man asked him if he was stealing the motor cycle. He denied it. This man was PW2. PW2 asked him for his identity card which he gave him and then PW2 searched the accused and found some money and a pair of small scissors. PW2 asked him why he had the scissors and whether he was smoking drugs there. He denied it. PW2 then hand-cuffed his left hand and brought him for a search of the area. Nothing was found. PW2 then had a look at the accused's motor cycle and found nothing. He then hand-cuffed the accused to the accused's motor cycle's shock absorber shaft and went back to his own motor cycle and brought it to where the accursed was. He then hand-cuffed him to his (PW2's) motor cycle, started the accused's motor cycle and switched on the light of the motor cycle and searched the area and drain but found nothing. PW2 then made the accused sit pillion on PW2's motor cycle having passed the other cuff under a belt on the seat and hand-cuffing the other hand of the accused. He was then taken to Cheras Police Station and made to sit in a hall at the police station. PW2 went away and came back after 10 to 15 minutes and told him that he must have taken drugs at that place. The accused denied it. PW2 told him that from his appearance he was a drug addict and said, "If I were to take you back to the place and make another search and if I fail to find anything I would have you sent for a urine test." Shortly after an Indian Inspector came and told PW2 that the van had gone out and told PW2 to wait. The van came and PW2 gathered some police personnel and the accused went with them in the van to the arrest scent. He was in the van with one police personnel and a search was conducted with torchlight and after 5 to 10 minutes he saw the police personnel squatting down with one of them holding a bag.

Except for a few minor discrepancies the cautioned statement of the accused which the defence admitted was similar to the testimony that the accused gave, replete with details of the arrest by PW2 alone, his being hand-cuffed while a search was being conducted by PW2, and there being no drug found. The cautioned statement also related that he was brought to the Cheras Police Station and that the police made a subsequent visit with him to the scene in a van where a plastic bag of drugs was found in the area.

Now the cautioned statement is in two parts. The first part was made on 24 April 1984 and the second part on 30 April 1984. The first part recounted the arrest of the accused by PW2 alone, their going back to the police station and their re-visiting to the scene when the drug was found. The second part contained details as to the accused's encounter with PW2 who was alone, the manner of the arrest, how he was hand-cuffed while PW2 made a search of the area, matters which coincided with the accused's testimony.

The investigating officer Inspector Raja Khalid, PW1, was asked about the necessity of recording the cautioned statement twice. And his honest answers to my mind throw light on the prosecution's case. He was asked under cross-examination why he needed a second cautioned statement and he answered,

> To ascertain from the accused person whether (when) he was detained by the police party who made the arrest (the police) used a motor vehicle.

He said it was important in a charge of trafficking in drugs to find out whether a vehicle was used to ascertain the manner of apprehension and arrest.

He was asked,

> True reason why you wanted to have second cautioned statement was because of conflicting information you received during the investigation?

He answered in the affirmative.

During the re-examination by the DPP PW1 was asked what the conflict of information was and he replied,

> It conflicted with the statement by Detective Ishak to the manner of the arrest.

And he added,

> I believe the first cautioned statement that was made.

In evaluating all the evidence before the Court I came across a number of disquieting features in the prosection's case.

If indeed the accused was arrested by PW2 why was his description of what had actually taken place ambiguous? Why, if indeed PW2 accompanied PW3 who drove his car to tail the accused, was the story of PW2 in regard to the manner of tailing the motor cycle not quite consistent throughout or consistent with the version given by PW3? Then again if indeed the accused was arrested by PW2 who had kept the accused under observation from the time he was spotted behaving suspiciously, as alleged, up to the time he was arrested and seen with a bag of drugs in his hand, why was there a necessity to re-visit the scene?

Then there was the unusual lateness in the lodging of a police report at 10 p.m. relating to the arrest of the accused and the discovery of the drugs when the police report should have been lodged shortly after the accused was brought to the Cheras Police Station at 8.25 p.m.

And since there was a dispute as to whether PW2 and his team were at the scene at the time of arrest in PW3's car or whether PW2 was there alone, their movements, they being on official duty, could have been verified from the station diary (relating to the date of arrest of the accused) of the crime preventive division where these officers were attached to. But it was not produced in spite of a Court order for its production. It was missing from the store. And it was the only diary that was missing.

I now turn to the ambiguities in the description of the accused's arrest and the seizure of the drugs.

In his examination-in-chief when asked what he did when the car stopped PW2 said that he got out from the car and straightaway held the person's hand; the accused was still on the motor cycle then. He said when he grabbed hold of the accused he said, "Polis!" PW2 was then asked to describe what took place after that and he said,

When I got hold of him, he appeared startled and I asked him to stand his motor cycle. After he had stood his motor cycle I went to handcuff him assisted by other members.

Clearly so far his evidence showed that he saw the accused still on the motor cycle when he (PW2) got out of the car and that he grabbed the accused's hand. No mention was made about the bag of drugs. When he got hold of him the accused appeared startled and PW2 asked him to stand his motor cycle. Again no mention was made about the bag of drugs.

PW2 continued his evidence thus,

He struggled in order to free himself and I managed to handcuff him with his hands at the back.

PW2 then in further evidence said,

When I got hold of his right hand I saw a plastic bag in his right hand. I got hold of the plastic bag and with the assistance of the other members I managed to handcuff him.

It is not clear from the above whether when PW2 grabbed hold of the accused for the first time he saw the bag of drugs in his right hand and got hold of it and then asked the accused to stand the motor cycle which he did before he handcuffed the accused after a struggle; or that he saw the bag in the accused's hand while the accused was standing his motor cycle or shortly after that and PW2 grabbed hold of it and then there was a struggle and the accused was handcuffed. The only witness who was allegedly at the scene who testified, PW3, said that when he (PW3) got out of car Detective Ishak (PW2) had handcuffed and arrested the accused and both of them were squatting facing each other. Strangely there was no evidence at all from him that he saw the arrest.

Given the ambiguity with which one can view the evidence of PW2 on evaluation of his evidence in the light of the issues raised in the light of the issues raised in the defence story, one needs to further examine his evidence given under cross-examination. PW2 re-iterated that the accused was still sitting on his motor cycle when he (PW2) got down from the car and that assisted by the others he went to handcuff him and he struggled. He was asked,

After he struggled you held his hand and then realised he was holding a plastic bag in his right hand?

PW2 replied,

When the cycle stopped I got out from the car and at that time I saw him holding plastic bag in his right hand.

He was asked,

So you were holding him and seeing him with a bag before the struggle?

He answered,

When I got down from the car I straightaway took hold of his right hand and I saw he was holding in his right hand a plastic bag.

He was then asked,

After you caught him on his right hand, he still struggled and refused to be handcuffed.

He replied,

Yes.

When did PW2 see the bag of drugs in the accused's hand? One would have expected some precise description of when he actually saw the packet of drugs. Was it as he got out of the car? Was it when he grabbed hold of the accused's hand? Or while the accused was standing his motor cycle or after that? Or there was no bag of drugs at all?

I also found an oddity in the evidence. Would a police officer request a suspect with drugs to stand his motor cycle which would require both hands of the suspect to be free to hold the handle bars of the motor cycle to manoeuvre it to a standing position? And yet according to PW2 at the next moment the accused was struggling with PW2 when PW2 tried to handcuff him. Who was holding the bag of drugs if PW2 stated, "He struggled in order to free him and I managed to handcuff him with his hands to the back"? If PW2 had grabbed the bag of drugs from the accused how could he have done that if one hand of PW2 was holding the bag?

I now turn to the evidence where PW2 and PW3 described how the accused, riding his motor cycle, was spotted, tailed and apprehended.

PW2 said as the car he was in was on its way from Jalan (Langgak) Golf to Jalan Tun Razak he saw the accused riding a motor cycle and behaving suspiciously. He informed PW3 to tail it and overtake it. And they tailed the motor cyclist for 4 to 5 minutes then PW3 overtook the motor cycle and cut across it. PW3's evidence was that while at Jalan Langgak Golf PW2 informed that team that the accused was acting suspiciously. He observed that too. So he followed him in his car and when "he (the accused) was about to turn left, heading towards Jalan Cheras, Detective Ishak asked me to overtake the motor cycle and stop." But the roundabout to Cheras was still far away from the alleged point and PW3 was asked under cross-examination,

> So what you said 'when he was about to turn to Jalan Cheras' is not true?

PW3 said that he could not quite remember as it happened a long time ago; and that what he could remember was that he started following the motor cycle from Jalan Langgak Golf.

I find this discrepancy strange unless it be explained in the light of the evidence of the accused that PW2 and PW3 were not in the car following the accused as they stated.

Still on the matter of the car which PW2 and PW3 said they used in order to follow the accused. If indeed they tailed the accused up to the time they arrested him surely it would mean that at least PW2 would have observed all the actions of the accused. In fact PW2 said he had the accused in his sight all the time. If PW2 found a bag of drugs in accused's hand and they had observed him all the way what was the necessity of re-visiting the scene to do a search of the scene for drugs?

PW2 said it was on the advice of Inspector Rajan that he went to the scene again. PW2 said he informed Inspector Rajan orally about the arrest when the latter arrived at the police station. He said, "He (Inspector Rajan) asked me whether I was satisfied with the surrounding area of the place of incident because at the place of arrest we were only helped by car light and torchlights. He instructed me to go to the place of incident by using a police van." He stated that when he received the instruction from Inspector Rajan, he (PW2) had the drugs in his hand. Inspector Rajan (PW5) in his evidence stated that at about 8.30 p.m. he was informed by PW2 of the arrest of the accused and the seizure of 24 packets of drugs and he told him to do a search at the scene if he had not done a thorough search there. Under cross-examination he however said that when PW2 came to see him PW2 did not show him the drugs; but that later he went to his (PW2's) room and saw the drugs there. In answer to

my questions he said he saw the drugs in small packets and that they were on a table in the main office. On an important matter there could be inconsistency in the evidence of two witnesses and it seems to me that in the context of all the peculiar features in the prosecution's case take cumulatively, PW5's evidence regarding his instruction to conduct a second search for the purpose presumably of getting more drugs has to be taken with caution; I consider the evidence on the matter to be far from satisfactory.

PW6, the police van driver, said he did not see anything being been brought to the van. He admitted he did not join in the search as he had sat in his van over 30 feet away from the search of the area. I find it hard to infer that if a bag of drugs was discovered and brought back to the van he was bound to see it.

I now come to the diary of the crime preventive division kept for 14 April 1984, the date of the arrest of the accused. The Court ordered it to be produced. Sergeant Major Nathan, officer in charge of the Cheras Police Station, stated that he had instructed that it be got from the division's store but it was found missing. He himself made a personal search and could not find it and he said it was the only dairy missing from that store. The diary would have had entries relating to the movements of officers who went out for official duty and it would most probably have had entries which would have verified whether PW2 had gone out on duty alone the night of the arrest or with the other members of the team. It is too much of a coincidence that that diary was missing - it was the only diary missing - and it seems to me reasonable to infer that the entries therein if available would probably tell against PW2 and PW3.

This brings me to the police report which was lodged only at 10 p.m. in respect of an arrest made at 8.15 p.m. PW2 had accused at the police station at 8.25 p.m. and he had ample time to make the report and also the incentive to do it early bearing in mind that a large amount of drugs, 24 packets of them, had been seized. But PW2 said that he did not make a report on his return because his superior officer had instructed him to re-visit the scene and search the area. This departure from normal police practice of making a police report at the earlier time is to say the least suspicious when considered in the light of all the oddities in the prosecution's case.

As I had stated earlier there have been a number of disquieting features in the prosecution's case. Taken cumulatively all these add to my accepting as very highly probable the accused's evidence that he was not arrested with him holding the drug; that it was PW2 alone who had arrested him suspecting him to be a drug addict; that PW2 came alone on his motor cycle and not with PW3 and 2 other police personnel as alleged; that the drugs were discovered later when PW2 with some police personnel had gone to the scene later that night and discovered the drugs which form the subject matter of the case. To my mind a reasonable doubt has been created on the prosection's case that that accused was in custody or control or possession of the drugs as alleged by PW2 in hid evidence. There being a reasonable doubt on the prosecution's case he is entitled to be acquitted. It is highly probable that the drugs were discovered subsequently by the police after PW2 re-visited the scene and there might have been more than a casual link between the drugs and the accused but that is not the prosecution's case which was based on the accused being caught holding the drugs. The accused is therefore acquitted and discharged.

Also found at [1988] 2 CLJ 482